

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FILADELFO FUNES,)	
)	
Claimant,)	
)	
v.)	IC 2005-502836
)	
AARDEMA DAIRY,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
and)	AND RECOMMENDATION
)	
STATE INSURANCE FUND,)	
)	
)	Filed August 12, 2008
Surety,)	
Defendants.)	
)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls, Idaho, on December 14, 2007. Emil F. Pike, Jr., of Twin Falls represented Claimant. Neil D. McFeeley of Boise represented Defendants. A translator was present for the benefit of Claimant and one of the witnesses who speak primarily Spanish. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on April 29, 2008, and is now ready for decision.

ISSUES

Pursuant to the Notice of Hearing dated November 16, 2007, and by agreement of the parties at hearing, the issues to be decided are:

RECOMMENDATION - 1

1. Whether Claimant's condition is due in whole or in part to a subsequent injury or disease or cause not work related;
2. Reimbursement of unpaid medical bills;
3. Whether Claimant is entitled to temporary partial and/or temporary total (TPD/TTD) benefits, and the extent thereof;
4. Whether Claimant failed to work after suitable work was offered such that Idaho Code § 72-403 is applicable;
5. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;
6. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of impairment, and the extent thereof;
7. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine;
8. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate; and
9. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant was born in Honduras and moved to the United States in the late 1990s. He speaks only Spanish and does not read or write in any language. It is undisputed that Claimant sustained an occupational injury to his low back on January 29, 2005, for which he underwent lumbar surgery on May 2, 2005.

RECOMMENDATION - 2

Claimant contends that his lumbar surgery was a failure and that he experiences debilitating chronic pain. Claimant asserts that he is medically disabled from returning to any type of employment. At the very least, Claimant is an odd-lot worker due to his lack of education and English skills combined with his injury-related impairment. In the event that Claimant's permanent disability is found to be less than total, Claimant seeks an award of substantial PPD in excess of PPI. Claimant's PPI is at least 10%, based on the opinion of the treating physician and surgeon, David Verst, M.D. His PPI should be rated as high as 20%, based on the opinion of neurologist Michael O'Brien, M.D. Claimant's injury extends to include his neck which Claimant mentioned at the time of initial medical treatment. His symptoms radiate into his right shoulder and impact the entire right side of his body. Claimant is entitled to reimbursement for unpaid medical and pharmacy bills for treatment received at the direction of K. Cheri Wiggins, M.D. Claimant seeks an award of attorney fees based on Defendant's failure to initiate PPD in excess of Claimant's 10% PPI; failure to acknowledge Claimant's neck symptoms as part of the compensable injury; and for failure to timely pay Dr. Wiggins' bills.

Defendants contend that Claimant's lumbar surgery was a success and that benefits paid for Claimant's 10% PPI rating fairly compensated Claimant for the permanent effects of his occupational injury. The compensable injury is limited to Claimant's low back and does not include the neck or right upper extremity. Employer offered appropriate light-duty work to Claimant in late July 2005, which Claimant voluntarily discontinued after working for two days. Although temporary disability benefits were paid through May 2007, they were paid in error and not owed based on Claimant's refusal of light-duty employment. Claimant has made no efforts to seek employment since declining light-duty work. The medical evidence fails to establish that Claimant is totally disabled. Claimant is capable of returning to work as a driver or in the

RECOMMENDATION - 3

restaurant business. Claimant's symptoms are grossly exaggerated and are not explained by objective medical findings. Claimant's symptom magnification and bizarre nature of his complaints have been noted by the majority of physicians who have evaluated him, including Dr. Verst, Dr. Wiggins, and the Independent Medical Examination (IME) panel. Although Claimant's 10% PPI rating is wholly attributable to the compensable low back injury, any permanent disability should be apportioned. Claimant had pre-existing degenerative changes and was previously infected by West Nile virus. Pre-existing conditions impact Claimant's current condition. Defendants rely on the IME panel's opinion that additional medical treatment is not necessary to treat the occupational injury. Defendants have paid what is owed on this case and have likely overpaid temporary disability benefits. There has not been an unreasonable denial of benefits and attorney fees should not be awarded.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, his former co-worker Javier Ramirez, his wife Maria Christina Funes, and Industrial Commission Rehabilitation Division (ICRD) field consultant Gregory Taylor, taken at hearing.
2. Claimant's Exhibits 1 through 14;
3. Defendants' Exhibits 1 through 10; and
4. The post-hearing deposition of David Verst, M.D., taken by Defendants on January 21, 2008.

All objections made during Dr. Verst's deposition are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

RECOMMENDATION - 4

FINDINGS OF FACT

Background and Injury.

1. Claimant was 47 and resided in Jerome, Idaho, at the time of hearing. Claimant was born in Honduras and moved to the United States in the late 1990s.

2. Claimant completed two years of education and worked as a taxi driver in San Pedro Sula by the time he was a teenager. Claimant speaks only Spanish and does not read or write in any language. He is able to transcribe numbers. Claimant helped his father with dairy cows and also worked as a truck driver in Honduras.

3. Claimant came to Idaho in 1999 where his first job was working for Rite Stuff, lifting baskets of potatoes weighing 50 to 60 pounds. He soon obtained work at a dairy farm after learning that dairies paid better. Claimant worked for multiple dairies in the Twin Falls/Jerome area from 1999 through 2004. His work included bringing cows from the corral into the dairy, milking cows with automatic milking machines, and driving.

4. Claimant began working for Employer in 2003, at their calf ranch. His primary job duty was driving. He picked up milk product, delivered colostrum, and drove new-born calves to various facilities. He was required to lift the calves and load them onto a trailer. The calves weighed between 80 and 150 pounds.

5. On January 29, 2005, Claimant experienced difficulty picking up a large female calf. A male calf simultaneously ran into his left hip. He felt like something “exploded” in his head. He felt pain “like a string” running down his right side to his waist.

Post-Injury Medical Treatment.

6. Initial medical treatment was sought on February 1, 2005, at St. Benedicts Family Medical Center. Claimant reported pain in the right side of his neck, back, and radiating into his

right leg. Thomas H. Zepeda, M.D., diagnosed a back strain with spasm and radicular symptoms. X-rays were normal.

7. Claimant received follow-up care from St. Benedicts by Gary Myers, PA-C. Claimant received physical therapy from February 16, 2005, through March 28, 2005, without improvement. Lumbar disc pathology was suspected.

8. A lumbar MRI was performed on March 1, 2005, that revealed an extruded disc at L5-S1 with likely L5 nerve root impingement. The MRI demonstrated multilevel mild degenerative disc disease.

9. Claimant was referred to spine surgeon David Verst, M.D., for ongoing care. Claimant's initial visit with Dr. Verst was on March 16, 2005, by which time Claimant was walking with a cane. Dr. Verst diagnosed an acute herniation. Claimant's condition did not improve with epidural steroid injections or other conservative treatment.

10. Dr. Verst performed a right L5-S1 laminectomy and discectomy on May 2, 2005. Claimant underwent a regular course of post-operative care, including 19 physical therapy sessions between June 6, 2005, and August 3, 2005.

11. On May 19, 2005, Dr. Verst noted that Claimant's neurological exam was normal and that Claimant reported only mild back pain. As of June 2, 2005, Claimant's pain was diminished and he experienced improved strength and range of motion. Claimant reported mild back pain at the next visit of June 27, 2005, at which time Dr. Verst released Claimant to return to work, with restrictions.

12. Dr. Verst re-evaluated Claimant on July 21, 2005. This appointment marks the turning point after which Claimant's subjective complaints became inconsistent with objective findings and medical assessment. Claimant felt that he was unable to return to light duty, for

four hours per day. Dr. Verst indicated that Claimant should continue working with the same restrictions, four hours per day.

13. Claimant's subjective complaints were unchanged by the evaluation of August 11, 2005, and he displayed limited motion. Dr. Verst recommended that Claimant be evaluated by orthopedic surgeon, David Christensen, M.D., and ordered a repeat MRI to rule out a recurrent disc herniation. A post-operative lumbar MRI revealed scar tissue, but no evidence of a recurrent herniation. Dr. Christensen evaluated Claimant on August 23, 2005. He diagnosed right sacroiliac (SI) dysfunction and recommended an SI injection. He felt that Claimant's condition was not fixed and stable, but that Claimant could return to light-duty work with a ten-pound lifting restriction, 20-pound push/pull restriction and the ability to change positions every 20 to 30 minutes.

14. On November 10, 2005, Claimant was evaluated by anesthesiologist Clinton Dille, M.D., for an SI injection. Dr. Dille could not identify any definitive neurological deficits and noted that Claimant's pain and other symptoms appeared to be "greatly exaggerated." However, he felt that Claimant could benefit from an SI epidural steroid injection, which he performed on November 14, 2005. The injection was of no benefit and Dr. Dille felt that additional injections would not help.

15. Claimant received additional physical therapy sessions during December 2005. Claimant's complaints of right shoulder pain increased.

16. On February 18, 2006, Dr. Verst responded to a questionnaire from Surety and indicated that Claimant's condition was medically fixed and stable. He assigned a 10% whole person PPI rating, with none of the rating attributable to pre-existing conditions.

17. On July 24, 2006, Dr. Verst opined that Claimant's neck and upper-extremity complaints were unrelated to the occupational injury. He had no additional recommendations for treatment and released Claimant from his care. However, Dr. Verst simultaneously referred Claimant to physical medicine and rehabilitation specialist K. Cheri Wiggins, M.D., for additional treatment.

18. Dr. Wiggins treated Claimant for approximately one year, from March 2006 through February 2007. At the initial visit of March 8, 2006, Dr. Wiggins prescribed Lyrica for pain management and reported that Claimant demonstrated "regionalization and pain behaviors." At the second evaluation on March 30, 2006, Dr. Wiggins noted "some symptom magnification" and described Claimant's abilities to ambulate as improving when he was not conscious of being observed.

19. Dr. Wiggins considered alternate causes for Claimant's symptoms. She ordered diagnostic studies of Claimant's neck and right shoulder which did not display findings that correlated with Claimant's reported pain. Blood work was performed and revealed an old infection of West Nile virus. Dr. Wiggins concluded that the West Nile exposure was at least partly responsible for some of Claimant's symptoms.

20. In May 2006, Claimant described pain from his neck down the back of his right leg. Dr. Wiggins concluded as follows:

At this point I honestly do not know what is going on with [Claimant]. His complaints continue to increase in number. He does not tolerate examination of even superficial palpation. His MRI only shows a significant straightening of the cervical lordosis along with a disc protrusion at C4-5 that contacts the cervical cord. Unfortunately, this does not correspond with any of the complaints that he tells me about. His primary complaint in the neck is at the atlantooccipital junction. He does not really complain of pain specifically in the shoulder and biceps region. He has not done well with physical therapy and I am afraid that I may be missing something due to the difficult [sic] I have in examining him. I think an IME would be helpful.

Claimant's Ex. 6, pp. 1-2.

21. Dr. Wiggins provided varying work restrictions. Claimant was taken off work at the initial visit, but released to light-duty work as of April 3, 2006. Claimant was given a 15-pound lifting restriction and advised to avoid kneeling as well as repetitive bending, twisting, or stooping. Claimant required the ability to alternate sitting, standing, and walking. Claimant was taken back off work on May 25, 2006. Claimant was released to return to two hours of work per day on August 17, 2006. As of October 24, 2006, Claimant continued to be limited to two hours of work per day, but his lifting restriction was raised to 20 pounds. These restrictions were reiterated on November 14, 2006. Claimant was taken off work on November 22, 2006.

22. Dr. Wiggins assigned 12% whole person PPI based on the 5th Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. She felt that Claimant fell within diagnoses-related estimate (DRE) category III. She declined to apportion any amount for the West Nile virus.

23. Dr. Wiggins released Claimant from care on February 7, 2007, to return on an as-needed basis only. She provided Claimant with a prescription for a year's worth of refills of Lyrica.

24. Claimant returned to Dr. Verst for an evaluation in March 2007. Dr. Verst noted that Claimant presented with chronic back and right leg pain. He diagnosed neuropathic pain, secondary to scar tissue around the nerve root. He explained that Claimant's symptoms far outweighed the objective MRI findings and felt that Claimant was not a candidate for future surgeries. He recommended bringing closure to Claimant's case with the assignment of appropriate ratings for impairment and disability.

25. Dr. Verst revisited the issue of a causal relationship between Claimant's neck problems and the low back injury on multiple occasions and provided inconsistent opinions. His initial opinion was that there is no relationship between the two (see paragraph 17, above). Dr. Verst responded to a letter of clarification from Claimant's attorney in November 2006, in which he concluded that Claimant injured his neck at the time of the occupational injury. In January 2007, Dr. Verst attributed 10% of Claimant's neck problems to the industrial injury and 90% to pre-existing conditions. In April 2007, Dr. Verst responded to a request for clarification from Surety and concluded that Claimant's neck pain and degeneration would not be related to the industrial injury.

26. Both Dr. Verst and Dr. Wiggins indicated that an IME would be appropriate. On April 12, 2007, Defendants arranged for Claimant to be evaluated by orthopedic surgeon Joseph Daines, M.D., psychiatrist Eric Holt, M.D., and neurologist Richard Wilson, M.D., (IME panel). Dr. Holt addressed Claimant's presentation of symptoms in detail and described Claimant as "exaggerating his pain symptoms in a naïve and unsophisticated manner and is attempting to portray himself as an invalid so that he would have secondary gain." The IME panel observed prominent pain behavior with muscle tenderness, but no involuntary muscle spasm.

27. The IME panel summarized their findings as follows:

Mr. Funes likely sustained a far right lateral L5-S1 intervertebral disc herniation as a result of his work injury of 1/29/05. He is now status post right L5-S1 laminectomy and disectomy. He has persistent, atypical low back pain with grossly over-determined pain behavior on examination and diminished sensation and giveaway weakness in his right leg and mild anatomic/physiologic pattern. His post-operative diagnostic workup has not shown any evidence of recurrent lumbar herniation nor does his diagnostic workup or current examination support objective evidence for his persistent back and right leg complaints.

Defendants' Ex. 6, p. 7.

28. With regard to extent of injury, the IME panel determined that the compensable injury did not extend beyond the lumbar spine. Claimant's reported symptoms in his head and behind his eye were described as "bizarre" and were without anatomic or physiologic findings. Claimant's upper back complaints were not the result of the low back injury and had no viable medical explanation.

29. The IME panel determined that Claimant could perform light-to-medium type work activities with lifting limited to 50 pounds, 25 pounds on a regular basis, and limited stooping and bending. They stated that no further medical treatment was indicated and suspected that Claimant's symptomology may improve following resolution of his workers' compensation claim.

30. In late May 2007, Dr. Verst responded to a questionnaire from Surety in which he indicated that he agreed with the findings of the IME panel.

31. On August 3, 2007, Dr. Wiggins responded to a questionnaire from Surety in which she indicated that she agreed with the findings of the IME panel.

32. Claimant was evaluated by neurologist Michael O'Brien, M.D., on September 11, 2007, at the request of his attorney. Dr. O'Brien reviewed Claimant's past medical records. Dr. O'Brien agreed that Claimant was medically stable, but disagreed with the 10% PPI rating assigned by Dr. Verst and the 12% rating assigned by Dr. Wiggins. Dr. O'Brien assigned a 20% PPI rating. He acknowledged that either a 10% or 12% impairment rating was consistent with a diagnosis-related estimate (DRE) category III as described in the 5th Edition of the *AMA Guides*. However, he felt that Claimant's PPI should be "moved up" one category from DRE III to IV because Claimant's condition continued to be symptomatic.

33. Dr. O'Brien indicated that Claimant presented with "marked spasm in the back which is quite apparent on examination." He described this as a "true organic finding." Dr. O'Brien diagnosed failed low back surgery with residual spasm and pain.

34. Dr. O'Brien completed paperwork for Social Security Disability regarding Claimant's ability to perform work-related activities. He concluded that Claimant could never lift more than 10 pounds, nor carry any amount of weight; that Claimant must use a cane to stand or walk; that Claimant needs to be able to constantly shift positions; that Claimant has limitations on hand movement secondary to low back discomfort; that Claimant is unable to use either foot; that Claimant should never engage in climbing, balancing, stooping, kneeling, crouching, or crawling; that Claimant is unable to drive; and that Claimant should avoid exposure to extreme heat, extreme cold, or vibrations.

35. Dr. Verst testified in his post-hearing deposition that Claimant's lumbar surgery went well and achieved the hoped-for result. Claimant's 10% PPI rating was based on the 5th Edition of the *AMA Guides*. Claimant's disc herniation and treatment with subjective complaints was appropriately described as DRE category III impairment. He does not see a basis for the 20% PPI rating assigned by Dr. O'Brien.

36. Dr. Verst admitted having changed his opinion about a causal relationship between Claimant's neck problems and the industrial injury. After a thorough review of his records, he now stands by the opinion that Claimant's neck symptoms are not related to the industrial injury.

37. Dr. Verst explained that Claimant's subjective complaints were out of proportion with objective findings. His experience with Claimant was similar to what was described by Dr.

Wiggins regarding the existence of a fictitious element to Claimant's symptoms. He agrees with the opinions of the IME panel.

38. Dr. Verst agrees that Claimant continues to suffer chronic pain and that pain is a highly individualized situation. In January 2007, Claimant had radiculitis involving the L5 dermatome. Radiculitis is considered to be an objective symptom that is caused by inflammation as opposed to nerve compression. Claimant's post-surgical MRI was negative for nerve root compression.

39. Dr. Verst does not have any reason to believe that Claimant should not be working. Micro-surgery is not a destabilizing procedure and patients are generally allowed to return to their pre-injury abilities once they have healed. Claimant's situation is atypical and complex because of his disproportionate amount of pain that is inconsistent and does not follow a particular dermatomal pattern. Dr. Verst agrees that Claimant's job opportunities are very limited because of his lack of education, inability to speak English, and work history focused on labor.

Claimant's Perception of His Condition.

40. Claimant felt as if something exploded in his head at the time of injury. He currently has the feeling of sharp poking between his shoulders. Claimant explained that he is unable to walk because of sharp pain in the low back and right leg. He never "feels O.K." and has difficulty sitting or standing for very long. His left knee is flimsy and locks up. Sometimes he gets numb and needs assistance to stand up. He must use a cane to walk.

41. Claimant's perception of his surgical outcome is not supported by the medical records. Claimant repeatedly testified that Dr. Verst closed him up without reconnecting his nerves and that Dr. Verst "just left [his nerves] one on top of another." Claimant also testified

that his teeth were broken during the surgery, presumably when anesthesia was administered. There is no medical evidence to support these assertions.

Lay Witness Testimony.

42. Javier Ramirez worked with Claimant for approximately three years, on overlapping shifts. He observed Claimant to be a good worker who was strong and able to take care of sick calves. Mr. Ramirez is out on disability because he has had two heart attacks.

43. Claimant's wife testified that Claimant was healthy and happy before the accident, but that the accident has changed him. Claimant cannot stand the pain. He is bitter and depressed. She worked weekends prior to her husband's injury, but went to work on a full-time basis in July 2006 to make ends meet. She worked for two weeks, but sustained an on-the-job back injury in August 2006, and has not returned to work since that time.

Vocational Evidence.

44. Gregory Taylor is a rehabilitation consultant with ICRD and has held that position for more than 17 years. He is familiar with employment opportunities in Twin Falls and the surrounding areas. He initially met with Claimant on March 23, 2005, at the referral of Surety. He met with Claimant on a monthly basis until closing his case in early 2007.

45. Mr. Taylor's initial efforts were with Employer. He confirmed that Claimant could not return to his time-of-injury job because of medical restrictions, but that Employer offered light duty. The light-duty positions available to Claimant were driving a water truck to calf pens and tagging calves ears with identification tags. Claimant attempted to drive the water truck, but the bouncing and jarring of the truck caused back pain and Claimant did not continue with light duty after two days.

46. Mr. Taylor did not make any referrals to Claimant, beyond light duty with Employer. He did not feel that there was anything that Claimant could do. Claimant felt that he was unable to work. Claimant's restrictions were severe and his labor market was diminished because of his lack of English skills.

47. Mr. Taylor observed Claimant using a cane and having difficulty with balance. He did not perceive Claimant's presentation as deceptive.

48. In February 2006, Mr. Taylor performed a skills analysis and determined that suitable jobs would be dog bather, cow puncher, and horse exerciser. According to Mr. Taylor, these jobs do not exist in the Magic Valley area.

49. Mr. Taylor did not identify which specific restrictions he relied upon, beyond indicating that they were very restrictive. In general, he based his opinions on restrictions given by Dr. Wiggins, as opposed to those assigned by Dr. Verst. Mr. Taylor declined to give an opinion as to whether the light-duty work offered by Employer was medically appropriate, since such opinion would require a medical opinion. However, Mr. Taylor assumed some restrictions that were not identified by medical service providers at the time the skills analysis was performed. For example, Mr. Taylor did not consider truck driving positions because of the need for prolonged sitting and because he felt that Claimant would have difficulty getting into some trucks. Mr. Taylor's opinion regarding Claimant's physical abilities was influenced by Claimant's presentation and Claimant's representations that he was unable to work. For example, Mr. Taylor felt that Claimant required a cane to walk, in spite of Dr. Verst indicating that Claimant could walk "frequently."

50. Mr. Taylor's involvement with the case predated restrictions assigned by either the IME panel or Dr. O'Brien.

51. With the benefit of hindsight, Mr. Taylor testified at hearing that, based on the restrictions given by Dr. Verst and the IME panel, Claimant would qualify for some restaurant positions and some driving jobs, in spite of his lack of English skills.

52. Mr. Taylor encouraged Claimant to take English as a second language (ESL) courses. Claimant attended the course for a couple of weeks, but discontinued attending them secondary to physical difficulty sitting through class. Claimant could have attended ESL classes based either on Dr. Verst's restrictions or if he would have asked permission from the instructor to alternate sitting and standing.

53. Claimant applied for Social Security disability benefits in 2005 and was denied. However, he appealed the decision and was found entitled to those benefits by early 2007.

54. Claimant has not made any efforts to return to work or become more employable beyond attempting light-duty work for two days, participating in ESL classes for approximately ten classes, and meeting with Mr. Taylor one time per month from March 2005 through early 2007.

DISCUSSION AND FURTHER FINDINGS

Causation

A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability, only their plain and unequivocal testimony conveying a conviction that

events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P. 3d 211, 217-218 (2001).

55. In the present case, Dr. Verst ultimately concluded that Claimant's neck and upper extremity complaints are not causally related to the compensable low back injury. Dr. Verst responded to requests by both parties for clarification on this issue. His opinions changed depending on what specific facts were provided to him and based on who was seeking clarification. During his post-hearing deposition, Dr. Verst addressed his inconsistent opinions and confirmed that, based on a complete review of his medical records, he stands by the opinion that there is not a causal relationship between Claimant's neck and left shoulder complaints and the low back injury. He took into consideration the fact that Claimant's initial intake form noted pain in the neck and that injuries to one level of the spine may cause referred symptoms to other areas of the spine and to the body in general.

56. The opinion of the IME panel is consistent with the opinion of Dr. Verst that the neck symptoms are not the result of Claimant's occupational injury. Dr. Wiggins initially opined that Claimant's neck problems were at least partly related to the industrial injury, but she was skeptical about the true nature of Claimant's symptoms. She subsequently concurred with the opinion of the IME panel.

57. Claimant has failed to establish that his occupational injury extends beyond his low back.

Medical Bills

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the

treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

58. Dr. Verst referred Claimant to Dr. Wiggins for treatment. Defendants paid for treatment at the direction of Dr. Wiggins through September 2006, but not thereafter. Treatment performed by Dr. Wiggins was reasonable and related to the occupational injury.

59. In April 2007, the IME panel opined that additional treatment was not necessary. However, Dr. Wiggins stopped treating Claimant in February 2007 and did not render treatment to Claimant after April 2007. There is no explanation as to why Defendants failed to pay for medical services provided by Dr. Wiggins from October 2006 through February 2007.

60. Claimant has established that he is entitled to medical benefits for services rendered by Dr. Wiggins from October 2006 through February 2007. The unpaid balance for which Defendants are responsible is \$1,056.

61. Dr. Wiggins prescribed Lyrica to Claimant at the time of her last examination in February 2007 and allowed twelve refills. Claimant refilled his prescription in June and July 2007 at a cost of \$240.11 per prescription. Defendants did not seek the concurrence of Dr. Wiggins with the IME panel's opinions until August 2007. Dr. Wiggins prescribed Lyrica for the effects of the compensable injury. The prescription was reasonable at the time it was issued and at the time the medication was dispensed.

62. Claimant has established that he is entitled to medical benefits in the amount of \$480.22 for prescription medication.

TTD/TPD

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

A claimant who has reduced wages attributable to an occupational disease may establish entitlement to partial disability benefits during periods of his or her period of recovery. TPD benefits are paid at an amount equal to sixty-seven per cent (67%) of the decrease in wage-earning capacity, but not to exceed the income benefits payable for total disability.

A claimant who refuses an offer of suitable work risks reduction or denial of temporary disability benefits pursuant to Idaho Code § 72-403, which states:

PENALTY FOR MALINGERING -- DENIAL OF COMPENSATION. If an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure.

63. Defendants' records reflect that Claimant was paid TTD/TPD from February 1, 2005, through May 21, 2007, totaling \$40,150.15.

64. There is a factual dispute as to when Claimant became medically stable and was no longer in a period of recovery. Dr. Verst indicated that Claimant's condition was medically

fixed and stable in February 2006. Dr. Wiggins indicated that Claimant's condition was medically fixed and stable in February 2007. The IME panel agreed that Claimant had reached MMI by the time of their examination in April 2007, but did not provide a specific retroactive date. Dr. O'Brien determined that Claimant had been medically stable and without improvement for "many months or even years" by the time of his evaluation in September 2007.

65. TTD/TPD benefits were properly suspended in May 2007. There is no medical opinion that suggest that Claimant had not reached medical stability by May 2007.

66. It is undisputed that Employer made an offer of light-duty employment to Claimant and that Claimant discontinued light-duty work after two half-day shifts. However, there is an absence of evidence that specifies the terms of the light-duty work. It is impossible to determine the amount of wages offered to Claimant while working light duty, the physical requirements of the light-duty work, and/or the duration of time when the light-duty employment would be available. Further, it is unknown whether Employer would have been able to accommodate the fluctuating restrictions assigned by Dr. Wiggins.

67. While there may have been a basis upon which Defendants could have suspended TTD/TPD benefits prior to May 2007, Defendants chose not to do so. The Referee declines to allow Defendants to seek reimbursement from Claimant or assert a credit against future benefits for a claimed overpayment due to error. Defendants have not established a legal basis upon which recoupment of past payments would be appropriate and such a finding would result in an undue hardship and/or financial impossibility to Claimant.

PPI

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered

stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

68. Dr. Verst properly calculated Claimant’s PPI rating at 10%. Dr. Wiggins’ assignment of a 12% PPI rating was based on the same medical theory as Dr. Verst’s rating and the difference reflects only a slight discretionary increase that is permitted by *The Guides* which allow a range from 10% to 13% for a DRE category III lumbar injury. The IME panel agrees with the 10% PPI rating assigned by Dr. Verst.

69. The 20% PPI rating assigned by Dr. O’Brien is not supported by the other medical evidence and is disregarded. Dr. O’Brien felt that Claimant should be moved up to a DRE category IV based on Claimant’s subjective complains of pain and radicular symptoms. However, the 5th Edition of *The Guides* indicate on page 384 (the same page that Dr. O’Brien references in his opinion) that DRE category IV is appropriate when there is loss of motion segment integrity as verified by comparative radiographs or when there is a fracture with more than 50% of one vertebral body. Neither circumstance applies in this case.

70. Claimant has a 10% whole person PPI as a result of his occupational injury.

PTD

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939, P.2d 854, 857 (1997). An odd-lot worker is one “so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.” *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable “in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

71. Claimant has failed to prove he is permanently and totally disabled by either of the above two methods. Claimant has gone through the motions of working with ICRD and attempted light-duty work for two half-day shifts. However, he has effectively sabotaged his return to work opportunities based on his disability presentation. He has not made a genuine effort to attempt work within his actual abilities.

72. There is an absence of credible medical evidence to establish that Claimant is unable to return to work. The IME panel determined that Claimant is able to perform light to

medium type work with permanent restrictions. Claimant is able to lift up to 50 pounds, lift up to 25 pounds on a regular basis, carry 50 pounds on an occasional basis, and limited stooping/bending. Although the IME panel evaluated Claimant on only one occasion, the IME panel's opinion is given significant weight since both Dr. Verst and Dr. Wiggins indicated they agree with the opinions of the IME panel.

73. Although Claimant perceives himself as extremely disabled, the majority of physicians who have evaluated Claimant identified symptom exaggeration and/or fictitious pain behaviors. These doctors include Dr. Verst, Dr. Dille, Dr. Wiggins and the IME panel.

74. Mr. Taylor testified that there are jobs available to Claimant based on the work restrictions imposed by the IME panel, in spite of Claimant's inability to speak English. Specifically, Claimant would qualify for driving jobs without loading/unloading requirements and for various types of restaurant work.

PPD

In the event that a claimant's disability is less than total, he or she may be entitled to permanent partial disability benefits. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring

or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

75. It is undisputed that Claimant’s time-of-injury job required him to lift more than 100 pounds. No doctor has released Claimant to lift more than 50 pounds since his injury and surgery. Although Mr. Taylor testified that most men in their 50s do not have jobs that require lifting more than 50 pounds, the limitation is significant to Claimant based on his line of past work and lack of education.

76. Certainly, Claimant has experienced permanent disability in excess of impairment as a result of his occupational injury. The calculation of Claimant’s disability rating is not an exact science in light of the fact that Claimant’s true abilities have been difficult to ascertain.

77. Claimant has established that he has PPD in the amount of 25%, inclusive of his 10% PPI.

Apportionment

Idaho Code § 76-406(1) provides:

In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

78. The Referee declines to recommend apportioning Claimant's PPD in this case. The evidence fails to establish that either Claimant's mild degenerative disc disease or previous West Nile virus have significantly impacted Claimant's ability to engage in gainful activity.

Attorney Fees

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

79. Defendants' refusal to acknowledge Claimant's neck as part of the compensable injury is supported by the medical evidence and is not unreasonable. Defendants' refusal to initiate PPD benefits in excess of PPI was not unreasonable, based on the legitimate factual dispute as to Claimant's actual physical abilities.

80. Defendants' refusal to pay for medical treatment at the direction of Dr. Wiggins was unreasonable. Medical records from Dr. Wiggins and her itemization of unpaid services (Claimant's Exhibit 9) clearly reflect that the \$1,056 balance is for treatment rendered to Claimant from October 24, 2006, through February 27, 2007. Defendants' payment log reflects that payments were made to Dr. Wiggins/Neurology of Twin Falls through September 2006, but not thereafter.

81. Defendants maintain in their post-hearing brief that:

Those bills were all incurred after the IME Panel concluded that the Claimant had no further need for medical treatment and Dr. Verst concurred. Claimant has not shown that any qualified physician had recommended additional medical treatment after the Panel's report of April 12, 2007.

Such representation is incorrect and misleading. Dr. Wiggins did not treat Claimant after February 2007. All of her bills are for services rendered prior to the IME panel's evaluation. Defendants stopped paying Dr. Wiggins' bills in October 2006, approximately four months before obtaining an IME. No reasonable explanation for cutting off Dr. Wiggins' treatment prior to April 2007 has been given.

82. Defendants' refusal to pay for prescription medication (Lyrica) in June and July 2007 was not unreasonable, based on the IME panel opinion and Dr. Verst's May 2007 concurrence with the report. Although the Referee finds that Defendants are liable for the payment for the prescription drugs in question, the Defendants' refusal to pay was not unreasonable at the time denial was made.

83. Claimant has established that he is entitled to attorney fees pursuant to Idaho Code § 72-804 based on Defendants' unreasonable refusal to pay Dr. Wiggins' bills, but not for the other reasons asserted. The amount of attorney fees should be based on the actual amount of time it took Claimant's attorney to pursue payment of Dr. Wiggins' unpaid bills and not necessarily limited to a percentage of the unpaid balance of \$1,056.

CONCLUSIONS OF LAW

1. Claimant's occupational low back injury of January 29, 2005, does not extend to include his neck or right upper extremity.

2. Claimant is entitled to payment of unpaid medical bills in the amount of \$1,056.00 to Dr. Wiggins and unpaid pharmacy bills in the amount of \$480.22.

3. Claimant has failed to prove entitlement to additional temporary disability benefits.

4. Defendants' are not entitled to reimbursement or a credit pursuant to Idaho Code § 72-403 for temporary disability benefits already paid.

5. Claimant is entitled to whole person permanent partial impairment benefits of 10%.

6. Claimant is not permanently disabled either by the 100% method or as an odd-lot worker.

7. Claimant is entitled to whole person permanent partial disability of 25%, inclusive of his permanent impairment.

8. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

9. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for the unreasonable denial of payment of medical bills.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this _1st_____ day of __August_____, 2008.

INDUSTRIAL COMMISSION

/s/ Michael E. Powers, Referee

ATTEST:

/s/ Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FILADELFO FUNES,)
)
Claimant,)
)
v.)
)
AARDEMA DAIRY,)
)
Employer,)
)
and)
)
STATE INSURANCE FUND,)
)
Surety,)
)
Defendants.)
_____)

IC 2005-502836

ORDER

Filed August 12, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant's occupational low back injury of January 29, 2005, does not extend to include his neck or right upper extremity.
2. Claimant is entitled to payment of unpaid medical bills in the amount of \$1,056.00 to Dr. Wiggins and unpaid pharmacy bills in the amount of \$480.22.
3. Claimant has failed to prove entitlement to additional temporary disability benefits.
4. Defendants are not entitled to reimbursement or a credit pursuant to Idaho Code § 72-403 for temporary disability benefits already paid.

5. Claimant is entitled to whole person permanent partial impairment benefits of 10%.

6. Claimant is not permanently disabled either by the 100% method or as an odd-lot worker.

7. Claimant is entitled to whole person permanent partial disability of 25%, inclusive of his permanent impairment.

8. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

9. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for the unreasonable denial of payment of medical bills. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel filed the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

10. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __12th__ day of August, 2008.

INDUSTRIAL COMMISSION

/s/_____
James F. Kile, Chairman

_____/s/_____
R.D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ____12th____ day of August, 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

EMIL F PIKE JR
PO BOX 302
TWIN FALLS ID 83303-0302

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

ge

_____/s/_____
